

IN THE MISSOURI SUPREME COURT

IN RE:

COREY M. SWISCHER,

Respondent.

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Case No. SC92336

RESPONDENT'S BRIEF

**CASKEY, HOPKINS & WILHELMUS, LLC
R. Todd Wilhelmus MO Bar No. 32270
8 North Delaware
PO Box 45
Butler, Missouri 64730
Telephone No. (660) 679-4161
Facsimile No. (660) 679-6268
TWilhelmus@CHW-Law.com
ATTORNEYS FOR RESPONDENT**

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STATEMENT OF FACTS

1. Larry Mackey

a. 341 Meeting and 2004 Examination

Swischer appeared for the 1st scheduled 341 Meeting of Creditors. (Tr. pg. 69, Ins. 13 - 20; pg. 235, Ins. 7 - 15). The debtor hadn't filed his Chapter 13 plan more than 7 days prior to the 341 meeting and therefore his 341 meeting was continued by the Chapter 13 Trustee. *Id.* The bankruptcy court schedules the 341 meetings, and, creditors have no input on the new date, nor will the 341 meeting be continued at a creditor's request. (Tr. pg. 235, Ins. 21 - 25; pg. 236, Ins. 1 - 13). Swischer, a solo practitioner was not available to attend the second 341 meeting of creditors. (Tr. pg. 235, Ins. 17 - 20). Swischer told Mr. Mackey he would appear at the first 341 meeting, but if it was continued he might not be able to appear at a subsequent 341 meeting if he wasn't available. (Tr. pg. 235, Ins. 7 - 25; pg. 236, Ins. 1 - 13).

Swischer, filed the Motion with the bankruptcy court and obtained an Order to conduct the 2004 Examination of the debtor, scheduled the 2004 Examination and sent notice to the debtor and his attorney to appear for the 2004 Examination. (RoA, Vol. 3, pg. 339, ln. 31; Vol. 3, pg. 353, Ins. 31 & 33; Tr. pg. 70, Ins. 7 - 9). However, the debtor simply failed to appear for the 2004 Examination. (Tr. pg. 70, Ins. 10 - 12). Swischer didn't reschedule the 2004 Examination because he realized he missed the deadline to file the Adversary Complaint objecting to the debtor's

discharge. (Tr. pg. 203, Ins. 24 - 25; pg. 204, Ins. 1 - 3). Mr. Mackey admitted bankruptcy was confusing and he didn't understand any of it (Tr. pg. 68, Ins. 4 - 25; pg. 69, Ins. 1 - 25).

b. Adversary Complaint

Swischer missed the deadline to object to the debtor's discharge. (Tr. pg. 210, Ins. 22 - 25; pg. 211, Ins. 1 - 25; pg. 212, Ins. 1 - 10). The deadline to file such an objection is in fact a statute of limitation. (Tr. pg. 210, Ins. 22 - 25; pg. 211, Ins. 1 - 25; pg. 212, Ins. 1 - 10). Once the deadline to file the Adversary Complaint is missed, there is absolutely no method or procedure to obtain leave to file the Adversary Complaint out of time. (Tr. pg. 214, Ins. 1 - 4); **Bankruptcy Rules 4004(a) & (b) and 9006(b)(3)**. However, the debtor's bankruptcy was dismissed. (Tr. pg. 210, Ins. 22 - 25; pg. 211, Ins. 1 - 25; pg. 212, Ins. 1 - 10). Swischer had already obtained a judgment in 2008 on behalf of Mackey, which Mackey has 10 years to collect or extend. **§ 511.370 RSMo**; (Tr. pg. 210, Ins. 22 - 25; pg. 211, Ins. 1 - 25; pg. 212, Ins. 1 - 10). Swischer met with Mr. Mackey and informed him of the missed deadline. (Tr. pg. 204, Ins. 21 - 25; pg. 205, Ins. 1 - 6; pg. 207, Ins. 16 - 25; pg. 208, Ins. 1 - 8). . Mackey didn't remember whether or not Swischer told him he missed the deadline to file the adversary action. (Tr. pg. 72, Ins. 6 - 25; pg. 73, 1 - 15).

c. Withdraw of Complaint

Mr. Mackey wanted to withdraw his complaint, and, Swischer simply did the paperwork. (Pg. 228, Ins. 3 - 20; pg. 229, Ins. 2 - 25; pg. 230, Ins. 1 - 6 & 15 - 24). Swischer repeatedly told Mr. Mackey to cooperate with the OCDC and to ignore the contractual provision stating otherwise. (Tr. pg. 240, Ins. 13 - 23). Mr. Mackey appeared and testified at the hearing. (Tr. pgs. 30 - 85).

2. Regina Foster

When the personal injury case settled it was not simply a matter of pulling out the claims of the lien holders and issuing them checks. Ms. Foster told Swischer she made numerous payments on the various liens and she wanted Swischer to follow up with the lien holders to determine the correct amount due on each before he paid them. (Tr. pg. 343, Ins. 19 - 25; pg. 344, Ins. 1 - 3; pg. 346, Ins. 2 - 7). Therefore, it took Swischer some time to sort out who he should pay and how much. The amount of the liens at the time of settlement was believed to be \$2,199.00. (Informant's Brief, pg. 20, 1st full ¶). Ms. Foster was correct, she had paid on the liens which is why she received an additional \$1,065.00 (Tr. pg. 365, Ins. 7 - 15) instead of it all going to the third-party medical providers. (Informant's Brief, pg. 22, 2nd full ¶). Swischer notified the lien holders he had funds to pay their liens when he received the settlement money. (Tr. Pg. 345, Ins. 8 - 12).

Dr. Ellefsen, one of the lien holders, was in federal prison for tax evasion, and, Swischer had to track down someone that was handling Dr. Ellefsen's business

before he could determine whether Ms. Foster owed any money on this lien, and if so how much. (Tr. pg. 345, Ins. 20 - 24; pg. 402, Ins. 7 - 24). Additionally, Swischer told his secretary, Sherry Simpson, several times to make out the checks to the known lien holders. (Tr. pg. 356, Ins. 18 - 20). She made the checks out but failed to give them to Swischer for his signature. (Tr. pg. 347 Ins. 22 - 24; pg. 348, Ins. 7 - 10). It was part of her duties to prepare checks for Swischer's signature. (Tr. pg. 356, Ins. 7 - 9). Swischer followed up with Ms. Simpson several times about the checks. (Tr. pg. 356, Ins. 18 - 20). Sherry Simpson was not providing copies of the statements from the lien holders to Swischer. (Tr. pg. 361, Ins. 21 - 25; pg. 362, Ins. 1 - 25; pg. 363, In. 1). Informant's brief makes allegations without any support in the record:

"... he was aware that the checks had not been written." (Informant's Brief, pg. 53, 1st full ¶, 5th line).

"... Ms. Foster continued to incur penalties for late payment. (Informant's Brief, pg. 53, last 2 lines of the 1st paragraph). In fact Mrs. Foster paid no penalties for late payment. (

Sherry Simpson was not competent to function as a legal secretary or paralegal. (Tr. pgs. 90 - 96; pg. 101, Ins. 9 - 24; pg. 419, In. 6 - pg. 423, In. 12). Swischer received a recommendation about Sherry Simpson's work from Laura West, an attorney at Scott Frederick's Office. (Tr. pg. 367, Ins. 14 - 25; pg. 368, In. 1). When Scott Frederick approached Swischer about Frederick's concerns about

Sherry Simpson, it was Laura West that downplayed Frederick's assessment of Sherry Simpson's abilities and assured Swischer Sherry Simpson would be fine. (Tr. pg. 368, Ins. 2 - 7). Sherry Simpson's work was a tremendous improvement over Swischer's prior secretary causing Swischer to lower his guard, and, Swischer made every attempt to monitor her work to ensure everything was done correctly. (Tr. pg. 371, Ins. 21 - 25; pg. 372, Ins. 1 - 9; pg. 387, Ins. 24 & 25; pg. 388, Ins. 1 & 2). He was unaware of the problems in his office. (Tr. pg. 387, Ins. 18 - 23). He has fixed the problems. (Tr. pg. 389, Ins. 6 - 23).

3. Sara Foster

In June, 2009, Sara Foster hired Swischer's wife for Ms. Foster's new husband to adopt Ms. Foster's children from a previous marriage. (Tr. pg. 303, Ins. 18 - 25). At the time Swischer's wife was practicing by herself in Butler, Missouri and Swischer was still working with his father in Nevada, Missouri. (Tr. pg. 304, Ins. 1 - 3; pg. 398, Ins. 3 - 7; pg. 295, Ins. 19 - 21). In late July, 2009, Swischer's wife ceased practicing because their child was diagnosed with Asperger's Syndrome, and, her behavior was so out of control that 1 of the Swischers had to remain with her at all times and the child was eventually institutionalized. (Tr. pg. 305, Ins. 17 - 19; pg. 395, Ins. 9 - 25, pg. 397, Ins. 1 - 7 & 20 - 23; pg. 396, Ins. 9 - 25; pg. 397, Ins. 1 - 7). In the switch from Mrs. Swischer running the office to Mr. Swischer taking over, Mr. Swischer did not learn about Sara Foster's case; it was simply missed. (Tr. Pg. 312, Ins. 9 - 20). As soon as Swischer learned of the case he completed it to the

satisfaction of Ms. Foster. Swischer never told the GAL, Brandon Kinney, he was not the GAL in the Foster case. (Tr. pg. 323, Ins. 14 - 22).

Additionally, Sherry Simpson was Swischer's secretary at the time and the office was in complete disarray because Sherry Simpson was not competent to function as a legal secretary or paralegal, which is why the case was overlooked.. (Tr. pgs. 90 - 96; pg. 101, Ins. 9 - 24; 189, Ins. 20 - 25; pg. pg. 190, Ins. 1 - 16; pg. 419, In. 6 - pg. 423, In. 12;). Sara Foster made an appointment to meet with Swischer on February 18, 2010, but, Sherry Simpson double booked Swischer who was scheduled to be in the bankruptcy court in Carthage, Missouri at the same time. (Tr. pg. 311, Ins. 20 - 25; pg. 312, Ins. 1 - 8). At the time, Swischer believed Sara Foster was contacting him about Regina Foster's case; Regina Foster is Sara Foster's mother-in-law. (Tr. pg. 318, Ins. 13 - 25; pg. 319, Ins. 1 - 2). Swischer was not receiving the messages Sara Foster left with Sherry Simpson. (Tr. pg. 320, Ins. 22 - 25; pg. 321, Ins. 1 - 3).

4. Charles Gossett

Swischer informed Mr. Gossett he was going to dismiss the case before he dismissed it, and, he had Mr. Gossett's consent to dismiss the case. (Tr. pg. 264, Ins. 10 - 13; pg. 22, Ins. 20 - 23). Swischer reduced his contingent fee contract with Mr. Gossett to writing, twice, but he lost the 1st and entered into a second on terms more favorable to Mr. Gossett. (Tr. pg. 294, Ins. 24 & 25; pg. 295, Ins. 1 - 25; pg. 296, Ins. 1 - 9). Mr. Gossett couldn't remember how many contingent fee

contracts he signed with Swischer. (Tr. Pg. 143, Ins. 23 - 25; pg. 144, Ins. 1 - 10). Mr. Gossett did not understand anything about medical malpractice lawsuits. (Tr. Pg. 144, Ins. 13 - 25; pg. 151, Ins. 23 - 25; pg. 152, Ins. 1 - 9; pg. 155; Ins. 8 - 11; pg. 158, Ins. 20 - 25).

ARGUMENT I

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE AS URGED BY INFORMANT BECAUSE RESPONDENT DID NOT FAIL TO ACT WITH REASONABLE DILIGENCE OR PROMPTNESS OR FAIL TO MAKE REASONABLE EFFORTS TO EXPEDITE LITIGATION ON BEHALF OF HIS CLIENTS AS ALLEGED BY INFORMANT IN THAT:

a1. Swischer did not Fail to Attend the 341 Meeting of Creditors, or to Conduct a 2004 Examination;

a2. Swischer failed to file an Adversary Complaint on behalf of Complainant Mackey;

b. The delay in resolving Regina Foster's Medical Liens and Excess Settlement Money was not Swischer's fault;

c. Swischer was not aware of Sara Foster's Adoption;

d1. Discovery, an Affidavit of Merit and the dismissal, pursuant to Mo.S.Ct.R. 67.02 are all procedural, technical and legal tactical issues over which an attorney has broad implied or apparent powers to conduct or control on behalf of clients; and

d2. The Application of Mo.S.Ct.R. 4-1.3 to the Timing of Swischer Re-Filing Mr. Gossett's Lawsuit, Urged by Informant, Violates Swischer's Constitutional Rights to Due Process and Equal Protection as Guaranteed by

the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution

a1. Swischer did not Fail to Attend the 341 Meeting of Creditors, or to Conduct a 2004 Examination

Swischer appeared for the 1st scheduled 341 Meeting of Creditors. (Tr. pg. 69, Ins. 13 - 20; pg. 235, Ins. 7 - 15). The debtor hadn't filed his Chapter 13 plan more than 7 days prior to the 341 meeting and therefore his 341 meeting was continued by the Chapter 13 Trustee. *Id.* The bankruptcy court schedules the 341 meetings, and, creditors have no input on the new date, nor will the 341 meeting be continued at a creditor's request. (Tr. pg. 235, Ins. 21 - 25; pg 236, Ins. 1 - 13). Swischer, a solo practitioner was not available to attend the 2nd 341 meeting of creditors. (Tr. pg. 235, Ins. 17 - 20). "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." (Emphasis added) **Mo.S.Ct.R. 4-3.2.** It can not be said that Swischer violated Mo.S.Ct.R. 4-3.2 for failing to attend the 2nd 341 Meeting when he was not available to attend the meeting, and, he can't continue the meeting. He is only required to make reasonable efforts to expedite litigation. To require him to attend when he is not available is patently unreasonable.

Swischer, filed the Motion with the bankruptcy court and obtained an Order to conduct the 2004 Examination of the debtor, scheduled the 2004 Examination and sent notice to the debtor and his attorney to appear for the 2004 Examination. (RoA,

Vol. 3, pg. 339, ln. 31; Vol. 3, pg. 353, lns. 31 & 33; Tr. pg. 70, lns. 7 - 9; Respondent's exhibit A, pg. 17). However, the debtor simply failed to appear for the 2004 Examination. (Tr. pg. 70, lns. 10 - 12). Swischer didn't reschedule the 2004 Examination because he realized he missed the deadline to file the Adversary Complaint objecting to the debtor's discharge. (Tr. pg. 203, lns. 24 & 25; pg. 204, lns. 1 - 3). If Swischer had pursued the 2004 Examination of the debtor knowing he missed the deadline to file the Adversary Complaint objecting to the debtor's discharge, it would have been a futile act. The law does not require anyone to perform a futile act. ***Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors, 744 S.W.2d 524, 531 (Mo.App. E.D. 1988); CIT Group/Equipment Financing, Inc v. Integrated Financial Services, Inc., 910 S.W.2d 722, 731 (Mo.App. W.D. 1995).*** Either Swischer or his client, Mackey, would have to pay for the 2004 Examination, but it would serve no purpose. Swischer's actions are not tantamount to stealing, because he refunded every penny Mackey provided to him, plus more. (Tr. pg. 76, lns. 12 - 20).

a2. Swischer failed to file an Adversary Complaint on behalf of Complainant Mackey

Mackey retained Swischer to file an Adversary Complaint to object to the debtor's discharge. Swischer missed the deadline to object to the debtor's discharge. (Tr. pg. 210, lns. 22 - 25; pg. 211, lns. 1 - 25; pg. 212, lns. 1 - 10). The deadline to file such an objection is in fact a statute of limitation. (Tr. pg. 210, lns.

22 - 25; pg. 211, Ins. 1 - 25; pg. 212, Ins. 1 - 10). However, the debtor's bankruptcy was dismissed. (Tr. pg. 210, Ins. 22 - 25; pg. 211, Ins. 1 - 25; pg. 212, Ins. 1 - 10; Respondent's exhibit A, pg. 18). Swischer had already obtained a judgment in 2008 on behalf of Mackey, which Mackey has 10 years to collect or extend. **§ 511.370 RSMo**; (Tr. pg. 210, Ins. 22 - 25; pg. 211, Ins. 1 - 25; pg. 212, Ins. 1 - 10). Swischer's missing the deadline was due to inadvertence and not intentional. Mackey is in the same or better position today as he was the day he hired Swischer. Mackey suffered no injury.

b. The delay in resolving Regina Foster's Medical Liens and Excess Settlement Money was not Swischer's fault

There was a delay in paying the medical liens and refunding the excess settlement money to Ms. Foster. However, the facts are not the same as in, *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010). Ehler misappropriated her client's money after miscalculating the amounts due to the parties in the case. In Ms. Foster's case, one of the medical providers that had a lien on the settlement proceeds, Dr. Ellefsen, was in federal prison for tax evasion, and, Swischer had to track down someone that was handling Dr. Ellefsen's business before he could determine whether Ms. Foster owed any money on this lien and if so how much. (Tr. pg. 345, Ins. 20 - 24; pg. 402, Ins. 7 - 24). Part of the problem was that Ms. Foster told Swischer that she had made numerous payments on the various liens and she wanted Swischer to follow up with the lien holders to determine the amounts were correct before he paid them.

(Tr. pg. 346, Ins. 2 - 7). The amounts of the liens weren't known. Therefore, it took Swischer some time to sort out who he should pay and how much. Ms. Foster was correct which is why she received additional money instead of it all going to the third-party medical providers. (Informant's Brief, pg. 22, 2nd full ¶). Additionally, Swischer told his secretary, Sherry Simpson, several times to make out the checks to the known lien holders. She made the checks out but failed to give them to Swischer for his signature. (Tr. pg. 347 Ins. 22 - 24; pg. 348, Ins. 7 - 10). It was part of her duties to prepare checks for Swischer's signature. (Tr. pg. 356, Ins. 7 - 9). Swischer followed up with Ms. Simpson several times about the checks. (Tr. pg. 356, Ins. 18 - 20). Informant's brief makes allegations without any support in the record:

"... he was aware that the checks had not been written." (Informant's Brief, pg. 53, 1st full ¶, 5th line).

Respondent was not aware the checks hadn't been written. (Tr. Pg. 361, Ins 21 - 25; Pg. 362, Ins. 1 - 6) He gave Sherry Simpson directions on several occasions to prepare the checks. As a result of his busy schedule, once he gave her the direction, he assumed it had been done and he didn't have to worry about it anymore. Sherry Simpson was not competent to function as a legal secretary or paralegal. (Tr. pgs. 90 - 96; pg. 101, Ins. 9 - 24; pg. 419, In. 6 - pg. 423, In. 12). Swischer received a recommendation about Sherry Simpson's work from Laura West, an attorney at Scott Frederick's Office. (Tr. pg. 367, Ins. 14 - 25; pg. 368, In. 1). When Scott Frederick approached Swischer about Frederick's concerns about

Sherry Simpson, it was Laura West that downplayed Frederick's assessment of Sherry Simpson's abilities and assured Swischer Sherry Simpson would be fine. (Tr. pg. 368, Ins. 2 - 7). Sherry Simpson's work was a tremendous improvement over Swischer's prior secretary causing Swischer to lower his guard, and, Swischer made every attempt to monitor her work to ensure everything was done correctly. (Tr. pg. 371, Ins. 21 - 25; pg. 372, Ins. 1 - 9; pg. 387, Ins. 24 & 25; pg. 388, Ins. 1 & 2). He was unaware of the problems in his office. (Tr. pg. 387, Ins. 18 - 23). He has fixed the problems. (Tr. pg. 389, Ins. 6 - 23).

Informant amended the complaint of Regina Foster to include a violation of Mo.S.Ct.R. 4-5.3 for failing to adequately supervise Sherry Simpson. (Tr. pg. 104, Ins. 17 - 24; pg. 363, Ins. 8 - 25; pg. 364, Ins. 1 - 25; pg. 365, Ins. 1 - 3). Informant charged Swischer with 2 ethical violations for the same conduct, a delay in the payment of the lien holders and/or Regina Foster. This violation is because Informant alleges Swischer failed to timely pay the lien holders and/or Regina Foster, and the other is for Swischer failing to supervise Sherry Simpson to make sure she prepared the checks for the lien holders and/or Regina Foster. These 2 charges are contradictory. If Swischer should have paid the lien holders and/or Regina Foster then there would be no reason for him to supervise Sherry Simpson to do so. If Swischer should have supervised Sherry Simpson paying the lien holders and/or Regina Foster then there would be no reason for Swischer to pay them. Swischer can only be guilty of 1 or none of these 2 charges, but not both.

Swischer submits he did adequately supervise Sherry Simpson in the paying of the lien holders and/or Regina Foster and he is not guilty of either ethical violation charged by Informant.

c. Swischer was not aware of Sara Foster's Adoption

In June, 2009, Sara Foster hired Swischer's wife for Ms. Foster's new husband to adopt Ms. Foster's children from a previous marriage. (Tr. pg. 303, Ins. 18 - 25). At the time Swischer's wife was practicing by herself in Butler, Missouri and Swischer was still working with his father in Nevada, Missouri. (Tr. pg. 304, Ins. 1 - 3; pg. 398, Ins. 3 - 7; pg. 295, Ins. 19 - 21). In late July, 2009, Swischer's wife ceased practicing because their child was diagnosed with Asperger's Syndrome, and, her behavior was so out of control that 1 of the Swischers had to remain with her at all times and the child was eventually institutionalized. (Tr. pg. 305, Ins. 17 - 19; pg. 395, Ins. 9 - 25, pg. 397, Ins. 1 - 7 & 20 - 23; pg. 396, Ins. 9 - 25; pg. 397, Ins. 1 - 7). In the switch from Mrs. Swischer running the office to Mr. Swischer taking over, Mr. Swischer did not learn about Sara Foster's case; it was simply missed. (Tr. Pg. 312, Ins. 9 - 20). As soon as Swischer learned of the case he completed it to the satisfaction of Ms. Foster.

Additionally, Sherry Simpson was Swischer's secretary at the time and the office was in complete disarray because Sherry Simpson was not competent to function as a legal secretary or paralegal. (Tr. pgs. 90 - 96; pg. 101, Ins. 9 - 24; 189,

Ins. 20 - 25; pg. pg. 190, Ins. 1 - 16; pg. 419, ln. 6 - pg. 423, ln. 12;). That is why the case was overlooked.

d1. Discovery, an Affidavit of Merit and the dismissal, pursuant to Mo.S.Ct.R. 67.02 are all procedural, technical and legal tactical issues over which an attorney has broad implied or apparent powers to conduct or control on behalf of clients

Discovery, an Affidavit of Merit and the dismissal, pursuant to Mo.S.Ct.R. 67.02 are all procedural, technical and legal tactical issues. An attorney has broad implied or apparent powers to conduct or control the procedure of litigation on behalf of clients. *Robinson v. DeWeese*, 379 S.W.2d 831, 836 (Mo.App. W.D. 1964). However, the decision on whether to settle a particular matter is reserved to the client. *Mo.S.Ct.R 4-1.2; In re Coleman* 295 S.W.3d 857, 863-64 (Mo. banc 2009). The lawyer should assume responsibility for technical and legal tactical issues. **Comment 1 to Mo.S.Ct.R 4-1.2.** Therefore, Swischer had the right to decide whether to file the case without an Affidavit of Merit, whether to respond to discovery before dismissing the case pursuant to *Mo.S.Ct.R. 67.02*, to dismiss the case pursuant to *Mo.S.Ct.R. 67.02* and to re-file the case.

d2. The Application of Mo.S.Ct.R. 4-1.3 to the Timing of Swischer Re-Filing Mr. Gossett's Lawsuit, Urged by Informant, Violates Swischer's Constitutional Rights to Due Process and Equal Protection as Guaranteed by

the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution

The right to practice law is a liberty and/or property interest enjoyed by Swischer that can not be taken from him without due process of law. ***State ex rel. Shackelford v. McElhinney, 241 Mo. 592, 145 S.W. 1139, 1142 (Mo. 1912).*** The right to engage in any common occupation is a liberty or property interest guaranteed by the 14th Amendment. ***Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 92 S.Ct. 2701, 2606-07, 33 L.Ed.2d 548 (1972).*** Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, the protections of due process are essential. ***Id. at 2707 7 573.*** The Supreme Court in regulating the practice of law must comply with the requirements of due process of the 14th Amendment. ***Schwartz v. Board of Bar Exam. of State of N.M. 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957).***

Swischer represents Mr. Gossett's in a case involving medical malpractice. (Tr. pg. 249, Ins. 15 - 20). The statute of limitations for medical malpractice cases is 2 years. **§ 516.105 RSMo.** The e-coli infection giving rise to Mr. Gossett's claim for medical malpractice was discovered in the later half of 2007 (Tr. pg. 107, Ins. 14 - 25). Suit was filed July 22, 2009. (Tr. pg. 114, Ins. 10 - 14; pg. 251, Ins. 11 - 14). At the time suit was filed, Swischer did not have an expert witness for his case, but he filed the case anyway to keep the statute of limitations from expiring to preserve Mr. Gossett's case. (Tr. pg. 256, Ins. 16 - 22; 300, Ins. 10 - 18). Plaintiffs in medical

malpractice cases are required to file, within 90 days from the date suit is filed, an Affidavit stating he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition. **§ 538.225, RSMo.** For good cause shown, the plaintiff can extend the time in which to file the Affidavit for another 90 days. **Id.** Mo.S.Ct.R. 67.02 permits a plaintiff to dismiss their case and re-file it. If a plaintiff dismisses their suit they can re-file it for a period up to 1 year. **§ 516.230, RSMo.** This is what Swischer did and what the law permits. However, Informant contends despite the fact the legislature provides Swischer with 1 year to re-file the lawsuit, Swischer somehow violated Mo.S.Ct.R. 4-1.3 (diligence) and 4-3.2 (expediting litigation).

The application of Mo.S.Ct.R. 4-1.3 and 4-3.2, urged by Informant, would violate Swischer's Constitutional Rights to Due Process and Equal Protection as Guaranteed by the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution because Mo.S.Ct.R. 4-1.3 and 4-3.2 would be too vague. Swischer has as statutory right to re-file the lawsuit for 1 year without penalty. **§ 516.230, RSMo.** The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. ***State ex rel. Nixon v. Peterson, 253 S.W.3d 77, 81***

(Mo. banc 2008). The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Id.* The language is to be evaluated by applying it to the facts at hand. *Id.* The vagueness doctrine requires the government mandate prohibiting or punishing certain activities provide:

1. reasonable notice of what is prohibited; and
2. some guidance for enforcement officials and courts so the mandate isn't

enforced in an arbitrary or discriminatory manner. ***State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596, (Mo. banc 1993)***. Swischer had a statutory right to re-file Mr. Gossett's lawsuit for 365 days. **§ 516.230, RSMo**. Neither Mo.S.Ct.R. 4-1.3 nor 4-3.2 give any indication upon which of those 365 days Swischer violated the rules concerning diligence or expediting litigation by waiting longer than a particular day. If Swischer had re-filed Mr. Gossett's lawsuit after only 364 days would he not have run afoul of Mo.S.Ct.R. 4-1.3 and 4-3.2? If so, what about day 363, 362, 361, 297, 255, 219, 201, 177, 133, 114 or 87? When the statute gives you 365 days to re-file a lawsuit, no person of ordinary intelligence would have a sufficiently definite warning, when measured by common understanding and practices, as to which day prior to day 365 they would run afoul of Mo.S.Ct.R. 4-1.3 and 4-3.2. Nor do Mo.S.Ct.R. 4-1.3 and 4-3.2 provide guidance for enforcement officials (OCDC) and/or the Missouri Supreme Court as to which date is the real deadline so Mo.S.Ct.R. 4-1.3 and 4-3.2 aren't enforced in an arbitrary or

discriminatory manner. Therefore, the application of Mo.S.Ct.R. 4-1.3 and 4-3.2 to the facts in this case, as urged by OCDC, violates Swischer's Constitutional Rights to Due Process and Equal Protection as Guaranteed by the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution because such an application is void for vagueness.

ARGUMENT II

THE SUPREME COURT SHOULD NOT DISCIPLINE SWISCHER BECAUSE HE DID NOT VIOLATE RULE 4-1.4 IN THAT HE ADEQUATELY COMMUNICATED WITH HIS CLIENTS BY ACCEPTING THEIR TELEPHONE CALLS HE RECEIVED, HE RETURNED CALLS WHEN HE RECEIVED THE MESSAGES AND KEPT HIS CLIENTS REASONABLY INFORMED ABOUT THE STATUS OF THEIR LEGAL MATTERS

Each of the people claiming Mr. Swischer didn't return their calls, left a message with his secretary. (Tr. Pg. 43, Ins. 15 - 23; pg. 186, Ins. 19 - 22; pg. 119, Ins. 15 - 20; pg. 146; Ins. 4 - 14). Mrs. Rash was able to speak with Mr. Swischer regularly. (Tr. pg. 172, Ins. 1 - 7; pg. 175, Ins. 20 - 25; pg. 177, Ins. 1 - 6; pg. 188, Ins. 25; pg. 189, Ins. 1 - 8; pg. 378, Ins. 19 - 25; pg. 379, Ins. 1 - 13) She was informed about what was transpiring in her case (Tr. pg. 172, Ins. 1 - 7; pg. 176, Ins. 20 - 25). Swischer kept his clients informed about their cases. Mrs. Rash had Swischer's cell phone number and spoke to him on his cell phone. (Tr. Pg. 378, Ins. 15 - 25, pg. 379, Ins. 1 - 13). Mrs. Rash spoke to Mr. Swischer regularly and received letters from Mr. Swischer concerning her case. (Tr. pg. 188, Ins. 1; pg. 189, Ins. 1 - 8; pg. 190, Ins. 23 - 25; pg. 379, Ins. 11 - 13). There wasn't any problem with Swischer communicating with clients before he moved out of his father's office in Nevada, Missouri and, took over his wife's practice in Butler, Missouri. (Tr. Pg. 139, Ins. 15 -

25; pg. 140, Ins. 1 - 2; pg. 146; Ins. 4 - 14). Since Sherry Simpson left, Swischer returns all of his calls. (Tr. Pg. 164, Ins 14 - 20; pg. 377, Ins. ; pg. 378, Ins. 10 -18).

Swischer didn't even know Sara Foster was a client. (Tr. Pg. 312, Ins. 9 - 20). She was however the daughter-in-law of another client, Regina Foster. (Tr. Pg. 318, Ins. 13 - 20). Sarah Foster picked up Regina Foster's settlement checks and regularly contacted Swischer on behalf of Regina Foster. (Tr. Pg. 318, Ins. 13 - 25). Therefore, Swischer dealt with Sara Foster regularly, but not on her case. Therefore, when she called or made appointments to speak with Swischer, nothing tipped off Swischer that he wasn't on top of Sara Foster's file.

Swischer can't return a call he didn't know he received. (Tr. pg. 395, Ins. 22 - 25). Swischer returned the calls of Larry Mackey (Tr. pg. 33, Ins. 20 - 25; pg. 34, Ins. 1 - 7 & 19 - 25; pg. 36, Ins. 2 - 25; pg. 37, Ins. 1 - 4; pg. 42, Ins. 24 - 25; pg. 43, Ins. 1; pg. 240, Ins. 2 - 4). If you accept Mr. Mackey at his word, he called Respondent 300 times over the course of a year. (Tr., pg. 40, Ins. 13 - 15). Mr. Mackey states Respondent didn't return approximately 50 calls. (Rec. on App. pgs. 764-65, Ex. # 16, 2nd page, last 2 lines). That would mean over the course of a year Respondent returned slightly more than 240 of Mr. Mackey's calls, averaging roughly 20 a month. There are only 20 - 22 work days in a month with no holidays. That means Respondent spoke to Mr. Mackey almost every day. If you don't accept Mr. Mackey's allegations as true then Informant failed to meet Informant's burden of proof. He kept Larry Mackey informed about the 341 meetings, the 2004 examination, the adversary

complaint and the missed deadline to file the adversary complaint (Tr. pg. 205, Ins. 1 - 6, pg. 207, Ins. 16 - 25; pg. 308, Ins. 1 - 8). Additionally, Respondent did not receive all of the messages about Mr. Mackey calling because his secretary failed to give them to him and failed generally in most of her duties. (Tr. Pg. 240, Ins. 24 & 25; pg. 241, ln. 1; pg. 368, Ins. 14 - 25; pgs. 369 - 387; pg. 388 Ins. 1 & 2).

ARGUMENT III

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT DID NOT FAIL TO KEEP SAFE FUNDS DUE TO A CLIENT AND THIRD PARTY MEDICAL PROVIDERS AND RESPONDENT DID NOT VIOLATE RULE 4-1.15 IN THAT RESPONDENT HELD THE FUNDS IN AN IOLTA TRUST ACCOUNT, HE PROMPTLY DELIVERED THE FUNDS TO HIS CLIENT AND THE THIRD PARTY MEDICAL PROVIDERS ONCE HE DETERMINED WHO SHOULD BE PAID AND IN WHAT AMOUNT AND HE NOTIFIED THEM OF THE RECEIPT OF THE FUNDS.

Informant cites, *In the Matter of St. Onge*, 958, A2d 143 (R.I. 2008), for the proposition that failure to promptly notify clients and third-party medical providers of the receipt of a settlement and to promptly pay the amounts due to them violates Rule 4-1.15. *St. Onge* paid \$3,035.00 of funds he withheld from a client's settlement, that were due to a third-party medical provider, to someone that worked in his office and was not entitled to the funds. *St. Onge* also paid \$7,294.00 from his trust account, that was due to a client, to another client. *St. Onge* received \$30,000.00 in escrow for a client for whom he settled a real estate matter. He was supposed to pay bills related to the parcel of real estate. While he did pay some of those bills, he paid other people who were not entitled to payment from those funds, with those funds, and, he paid himself an \$11,000.00 fee to which he wasn't entitled.

In *Attorney Grievance vs. Zuckerman*, 872 A.2d 693 (Md. 2005), Zuckerman failed to notify or pay clients and/or third-party medical providers proceeds from their settlements for more than 3 years after the settlement proceeds were received; failed to pay himself his fee from his trust account, for periods ranging from 1 to 5 years, on cases he settled; deposited fees paid to him which he had not yet earned into his operating account and not to his trust account; and he routinely paid clients with funds belonging to other clients.

In, *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010), Ehler misappropriated her client's money and incorrectly calculated the amounts due to the parties. Swischer maintained the funds in an IOLTA Trust Account and paid everyone correctly. (Tr. Pg. 346, Ins. 8 - 11). There was never an allegation he incorrectly paid someone or that he paid someone he shouldn't have or paid them the incorrect amount, or he converted any of the funds to his own use. There was simply a delay in getting everything finished. In Ms. Foster's case, one of the medical providers that had a lien on the settlement proceeds, Dr. Ellefsen, was in federal prison for tax evasion, and, Swischer had to track down someone that was handling Dr. Ellefsen's business before he could determine whether Ms. Foster owed any money on this lien. (Tr. pg. 345, Ins. 20 - 24; pg. 402, Ins. 7 - 24). Part of the problem was that Ms. Foster told Swischer that she made numerous payments on the various liens and she wanted Swischer to follow up with the lien holders to determine the amounts were correct before he paid them. (Tr. pg. 346, Ins. 2 - 7). Therefore, it took Swischer some time

to sort out who he should pay and how much. Ms. Foster was correct which is why she received additional money instead of it all going to the third-party medical providers. (Tr. Pg. 365, Ins. 7 - 15; Informant's Brief, pg. 22, 2nd full ¶). Once he determined who he should pay and in what amount he did so.

Additionally, Swischer told his secretary, Sherry Simpson, several times to make out the checks to the known lien holders. She made the checks out but failed to give them to Swischer for his signature. (Tr. pg. 347 Ins. 22 - 24; pg. 348, Ins. 7 - 10). It was part of her duties to prepare checks for Swischer's signature. (Tr. pg. 356, Ins. 7 - 9). Swischer followed up with Ms. Simpson several times about the checks. (Tr. pg. 356, Ins. 18 - 20). Informant's brief makes allegations without any support in the record:

"... he was aware that the checks had not been written." (Informant's Brief, pg. 53, 1st full ¶, 5th line).

Respondent was not aware the checks hadn't been written. He gave Sherry Simpson directions on several occasions to prepare the checks. As a result of his busy schedule, once he gave her the direction, he assumed it had been done and he didn't have to worry about it anymore. Sherry Simpson was not competent to function as a legal secretary or paralegal. (Tr. pgs. 90 - 96; pg. 101, Ins. 9 - 24; pg. 419, In. 6 - pg. 423, In. 12). Swischer received a recommendation about Sherry Simpson's work from Laura West, an attorney at Scott Frederick's Office. (Tr. pg. 367, Ins. 14 - 25; pg. 368, In. 1). When Scott Frederick approached Swischer about

Frederick's concerns about Sherry Simpson, it was Laura West that downplayed Frederick's assessment of Sherry Simpson's abilities and assured Swischer Sherry Simpson would be fine. (Tr. pg. 368, Ins. 2 - 7). Sherry Simpson's work was a tremendous improvement over Swischer's prior secretary causing Swischer to lower his guard, and, Swischer made every attempt to monitor her work to ensure everything was done correctly. (Tr. pg. 371, Ins. 21 - 25; pg. 372, Ins. 1 - 9).

ARGUMENT IV

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE FOR NOT RESPONDING TO INQUIRIES FROM THE OCDC AS URGED BY INFORMANT BECAUSE RESPONDENT WAS FACED WITH A DECISION BETWEEN CONFLICTING DISCIPLINARY RULES AND RESPONDENT CORRECTLY PLACED HIS OBLIGATIONS TO HIS CLIENTS BEFORE HIS OBLIGATION TO THE OCDC IN THAT THE APPLICATION OF MO.S.CT.R. 4-8.1(c) URGED BY INFORMANT IS SO VAGUE THAT IT VIOLATES SWISCHER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, § 10 OF THE MISSOURI CONSTITUTION BECAUSE IT DOES NOT PROVIDE REASONABLE NOTICE OF WHAT IS PROHIBITED OR SOME GUIDANCE FOR ENFORCEMENT OFFICIALS AND COURTS SO THE MANDATE ISN'T ENFORCED IN AN ARBITRARY OR DISCRIMINATORY MANNER

Sherry Simpson was not competent to function as a legal secretary or paralegal. (Tr. pgs. 90 - 96; pg. 101, Ins. 9 - 24; pg. 419, In. 6 - pg. 423, In. 12). When the first 3 complaints came in, Sherry Simpson did not give them to Swischer and he didn't know about them (Tr. pg. 380, Ins. 1 - 6). He couldn't respond to something he didn't know existed. Swischer did respond to Mr. Mackey's complaint. (Tr. pg. 392, Ins. 23 - 25; RoA Vol. VI, pgs. 945-46, Exhibits 54 & 56; Tr. Pg. 221, Ins. 11 - 20; pg. 222, Ins 24 & 25; pg. 223, Ins. 1 - 14). However, the response Swischer

submitted was deemed by the OCDC to not be an appropriate response. Swischer responded to the complaint of Sara Foster. (Tr. pg. 403, Ins. 15 - 20). Once he discovered them, he discovered everything else that Sherry Simpson hadn't done and hadn't told him he spent his time tearing his office apart, putting it back together and trying make sure he didn't miss anything so no harm came to any clients. (Tr. pg. 384, Ins. 6 - 20). The extra work, plus dealing with a daughter that was diagnosed with Asperger syndrome (Tr. pg. 305, Ins. 17 - 19; pg. 395, Ins. 9 - 25, pg. 397, Ins. 1 - 7 & 20 - 23) left Swischer with a choice. He could spend his time responding to the complaints and risk missing a deadline, leading to harm to a client, or, he had to do a complete inventory of the office and make sure he was on top of everything. (Tr. pg. 384, Ins. 21 - 25; pg. 385, Ins. 1 - 2). He chose to put his clients first before himself. Swischer understands the profound duty imposed by the profession. However, sometimes there just isn't enough time to get everything done. Swischer understood his duty to his clients and made that his first priority.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system. **Mo.S.Ct.R. 4, Preamble.**

The most important ethical duties for an attorney are those that are owed to a client. See ABA Standards for Imposing Lawyer Sanctions (1986) (amended 1992) (herein after “ABA Standards”) (Respondent’s Appendix, pg. 24, $\frac{2}{3}$ of the way down). Therefore when he didn’t have sufficient time to do everything, Swischer correctly chose to devote his time to ensuring he didn’t miss something for a client, instead of responding to the OCDC.

The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. ***State ex rel. Nixon v. Peterson, 253 S.W.3d 77, 81 (Mo. banc 2008)***. The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. ***Id.*** The language is to be evaluated by applying it to the facts at hand. ***Id.*** The vagueness doctrine requires the government mandate prohibiting or punishing certain activities provide:

1. reasonable notice of what is prohibited; and
2. some guidance for enforcement officials and courts so the mandate isn’t enforced in an arbitrary or discriminatory manner. ***State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596, (Mo. banc 1993)***.

The Preamble to Missouri Supreme Court Rule 4 specifically states that attorneys will be faced with situations in which they are faced with a conflict between a lawyer's responsibilities to clients and to the legal system. This is exactly the

situation with which Swischer was faced. The Rules of Professional conduct state, “Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.” **Mo.S.Ct.R. 4, Preamble**. Swischer did exactly that putting his clients ahead of himself and the legal system. However, the OCDC wants to discipline him for doing that. There is no guidance for Swischer, the OCDC or the Supreme Court on how to resolve this dilemma. Therefore the application of Mo.S.Ct.R. 4-8.1(c), as urged by Informant is void for vagueness.

ARGUMENT V

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT MADE REASONABLE EFFORTS TO ENSURE HIS NON-LAWYER ASSISTANT CONDUCT WAS COMPATIBLE WITH RESPONDENT'S PROFESSIONAL OBLIGATIONS CONSISTENT WITH RULE 4-5.3(b) IN THAT RESPONDENT WAS UNAWARE OF THE PROBLEMS WITH HIS ASSISTANT HE MADE EVERY ATTEMPT TO MONITOR HER WORK TO ENSURE EVERYTHING WAS DONE CORRECTLY.

When Swischer first noticed issues with Sherry Simpson, she was calling in sick and she appeared to be highly medicated or over medicated on the job to the point that she was sent home. (Tr. pg. 371, Ins. 3 - 20). Swischer attempted to make sure she was doing her job correctly. (Tr. pg. 371, Ins. 21 - 25; pg. 372, Ins. 1 - 17). There was never anything to suggest that Ms. Simpson was not taking messages from clients or not relaying the messages to Swischer until April 27 or 28, 2010. (Tr. pg. 381, Ins. 17 - 25; pg. 382, Ins. 1 - 25; pg. 383, Ins. 1 - 14). Absent evidence that Swischer was aware of a persistent problem with Sherry Simpson relaying messages and providing Swischer with his mail, Swischer can not be said to have violated Mo.S.Ct.R. 4-5.3(b). ***Attorney Grievance Com'n of Maryland v. Ficker, 349 Md. 13, 23 -24, 706 A.2d 1045, 1050 (Md. App. 1998).*** An attorney should not be disciplined for not returning calls when an secretary isn't informing the attorney of the calls. There is a tremendous difference between a secretary that is taking advantage

of an attorney by calling in sick when she isn't sick, and, a secretary that isn't giving the attorney his messages. An instance of one is not indicative of the other. Swischer told Sherry Simpson to prepare the checks in Regina Foster's case. In his busy schedule, once he told her to do that he relaxed assuming it was done, he signed them and everything was finished. It wasn't. He simply was overwhelmed with work and they slipped his mind. Swischer discussed with Sherry Simpson her job responsibilities and attempted to ensure she fulfilled them. (Tr. pg. 371, Ins. 21 - 25; pg. 372, Ins. 1 - 9). Each time Swischer discussed matters with Sherry Simpson, she assured Swischer she was performing up to his expectations. (Tr. Pg. 376, Ins. 15 - 18). Sherry Simpson was not giving Swischer his messages. (Tr. Pg. 377, Ins. 10 - 15).

Point / Argument V is based upon the same set of operative facts as Point / Argument IB. First Informant charged Swischer with failing to promptly finalize Regina Foster's personal injury case. Now Informant charges Swischer with failing to supervise Sherry Simpson to promptly finalize Regina Foster's personal injury case. Swischer received a recommendation about Sherry Simpson's work from Laura West, an attorney at Scott Frederick's Office. (Tr. pg. 367, Ins. 14 - 25; pg. 368, In. 1). When Scott Frederick approached Swischer about Frederick's concerns about Sherry Simpson, it was Laura West that downplayed Frederick's assessment of Sherry Simpson's abilities and assured Swischer Sherry Simpson would be fine. (Tr. pg. 368, Ins. 2 - 7). Sherry Simpson's work was a tremendous improvement over

Swischer's prior secretary causing Swischer to lower his guard, and, Swischer made every attempt to monitor her work to ensure everything was done correctly. (Tr. pg. 371, Ins. 21 - 25; pg. 372, Ins. 1 - 9; pg. 387, Ins. 24 & 25; pg. 388, Ins. 1 & 2). He was unaware of the problems in his office. (Tr. pg. 387, Ins. 18 - 23). He has fixed the problems. (Tr. pg. 389, Ins. 6 - 23).

ARGUMENT VI

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE AS URGED BY INFORMANT BECAUSE RESPONDENT'S CONDUCT WAS NOT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND DID NOT VIOLATE RULE 4-8.4(d) IN THAT THE APPLICATION OF MO.S.CT.R. 4-8.4(d) URGED BY INFORMANT IS SO VAGUE THAT IT VIOLATES SWISCHER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, § 10 OF THE MISSOURI CONSTITUTION BECAUSE IT DOES NOT PROVIDE REASONABLE NOTICE OF WHAT IS PROHIBITED OR SOME GUIDANCE FOR ENFORCEMENT OFFICIALS AND COURTS SO THE MANDATE ISN'T ENFORCED IN AN ARBITRARY OR DISCRIMINATORY MANNER

The application of Mo.S.Ct.R. 4-8.4(d), urged by Informant, violates Swischer's Constitutional Rights to Due Process and Equal Protection as Guaranteed by the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution because Mo.S.Ct.R. 4-8.4(d) would be too vague. The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. ***State ex rel. Nixon v. Peterson, 253 S.W.3d 77, 81 (Mo. banc 2008)***. The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and

practices. *Id.* The language is to be evaluated by applying it to the facts at hand.

Id. The vagueness doctrine requires the government mandate prohibiting or punishing certain activities provide:

1. reasonable notice of what is prohibited; and
2. some guidance for enforcement officials and courts so the mandate isn't

enforced in an arbitrary or discriminatory manner. ***State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596, (Mo. banc 1993).*** Missouri Supreme Court Rule 4-8.4(d) provides:

It is professional misconduct for a lawyer to:

...

- (d) engage in conduct that is prejudicial to the administration of justice;

It says nothing about settling a malpractice claim and/or a complaint to the OCDC with a settlement agreement and payment of money to the client, not to have a client sign a letter withdrawing a complaint or requesting a client withdraw a complaint.

The language is broad, sweeping and all encompassing. However it does not provide any reasonable notice of what is prohibited. Likewise it provides no guidance for the OCDC and/or the Supreme Court on what is prohibited to prevent Mo.S.Ct.R. 4-8.4 from being enforced in an arbitrary or discriminatory manner. It is so wide open the OCDC and/or the Supreme Court can apply it to almost anything.

There are no cases in Missouri interpreting Rule 4-8.4 in the manner sought by Informant. The comments to Rule 4-8.4 don't suggest in any manner that seeking

to resolve a complaint by a client to the OCDC with a settlement agreement, payment to the client and withdraw of the complaint by the complainant is a violation of Rule 4-8.4. While the Iowa Supreme Court, as cited by Informant, construed the rule as requested by Informant, other courts have reached contradictory results. Offering a complainant a sum of money to withdraw a complaint is not professional misconduct when the attorney by his offer did not intend to nor did he obstruct the disciplinary authority's inquiry. ***Chase vs. New York State Bar Association, 51 A.D.2d 833, 379 N.Y.S.2d 551, 552 (S.Ct. NY 1976)***. Swischer's did not intend to, nor did he actually obstruct the OCDC's inquiry. While the cases from Iowa cited by Informant are persuasive authority for this court, so is ***Chase vs. New York State Bar Association, 51 A.D.2d 833, 379 N.Y.S.2d 551, 552 (S.Ct. NY 1976)***. There is no guidance for Swischer or this court pertaining to Mo.S.Ct.R. 4-8.4(d) and the application of the rule to Swischer's conduct violates Swischer's Constitutional Rights to Due Process and Equal Protection as Guaranteed by the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution because Mo.S.Ct.R. 4-8.4(d) is too vague.

A lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. ***Mo.S.Ct.R. 4-8.4, comment [2]***. Offenses involving violence, dishonesty, breach of trust, or **serious interference with the administration of justice** are in that category (emphasis added). *Id.*

Swischer did not interfere with the administration of justice. He encouraged his clients to cooperate with the OCDC and they did. (Tr. pgs. 168 - 193; Tr. pgs. 30 - 85; Tr. pg. 240, Ins. 13 - 23). Swischer was not aware there was a prohibition against a client withdrawing a complaint as part of the settlement of a legal malpractice claim. (Tr. pg. 230, Ins. 7 - 14). Mr. Mackey wanted to withdraw his complaint, and, Swischer simply did the paperwork. (Pg. 228, Ins. 3 - 20; pg. 229, Ins. 2 - 25; pg. 230, Ins. 1 - 6 & 15 - 24). Swischer repeatedly told Mr. Mackey to cooperate with the OCDC and to ignore the contractual provision stating otherwise. (Tr. pg. 240, Ins. 13 - 23). There was no interference with investigation of Mr. Mackey's complaint by the OCDC, and, Mr. Mackey appeared and testified at the hearing. (Tr. pgs. 30 - 85).

Bonnie Rash also appeared and testified at the hearing. (Tr. pgs. 168 - 193). Nothing Swischer did or said interfered with the OCDC's investigation or litigation of any of the complaints against Swischer.

ARGUMENT VII

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE BECAUSE HE DID REDUCE HIS CONTINGENT FEE AGREEMENT WITH CHARLES GOSSETT TO WRITING BUT MISPLACED THE ORIGINAL WRITING AND THEN ENTERED INTO A SECOND WRITTEN CONTRACT WITH MR. GOSSETT ON MORE FAVORABLE TERMS TO MR. GOSSETT IN THAT NOTHING IN THE RULES OF PROFESSIONAL CONDUCT MAKE IT AN OFFENSE TO MISPLACE OR LOSE A CONTRACT

Mr. Gossett hired Swischer, on a contingency basis in June, 2008 while Swischer was working at his father's firm in Nevada, Missouri. (Tr. pg. 249, Ins. 16 - 25; pg. 250, Ins. 1 - 21; pg. 254, Ins. 4 - 8). Gossett signed a written contingency contract for 40%, 45% if the case settled within 10 days of trial and 50% in the event of trial. (Tr. pg. 294, Ins. 24 & 25; pg. 295, Ins. 1 - 18). Then Swischer moved his office to Butler, Missouri and discovered he did not have a copy of Mr. Gossett's contingency fee contract. (Tr. pg. 295, 19 - 25). Swischer then prepared a 2nd contingency fee contract in his Butler, Missouri office which Mr. Gossett signed and which provided Swischer a 33% fee. (Tr. pg. 295, 19 - 25; pg. 296, Ins. 1 - 9).

It isn't a violation of the Rules of Professional Conduct to lose a contract and replace it with another, especially when the 2nd contract provides the client with more favorable terms.

ARGUMENT VIII

THE SUPREME COURT SHOULD ADMONISH OR REPRIMAND RESPONDENT
BECAUSE SUSPENSION IS NOT APPROPRIATE IN THAT:

- A. RESPONDENT DID NOT KNOWINGLY FAIL TO PROVIDE SERVICES TO A CLIENT OR ENGAGE IN A PATTERN OF NEGLECT BY FAILING TO COMMUNICATE OR DILIGENTLY PURSUING A CLIENT MATTER;
- B. RESPONDENT DID NOT CAUSE AN ADVERSE EFFECT ON A LEGAL PROCEEDING
- C. RESPONDENT DID NOT IMPROPERLY DEAL WITH THE FUNDS OF A CLIENT OR A THIRD-PARTY; AND
- D. RESPONDENT DID NOT KNOWINGLY ENGAGE IN CONDUCT IN VIOLATION OF A DUTY OWED TO THE PROFESSION.

The American Bar Association's Standards for Imposing Lawyer Sanctions provide guidance for the court's determination of what sanctions to impose upon Swischer. ABA Ctr. for Prof'l Responsibility, Standards for Imposing Lawyer Sanctions (1986) (amended 1992) [hereinafter ABA Standards]. *In re Belz*, 258 S.W.3d 38, 41 (Mo. 2008) citing *In re Crews*, 159 S.W.3d 355, 360 - 61 (Mo. banc 2005). The court considers four primary factors as the basic framework for all disciplinary matters when imposing sanctions after a finding that a lawyer has committed professional misconduct:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors. *Id. at 42.*

The remaining standards provide guidance as to appropriate sanctions for specific types of misconduct. *Id.*

The ABA Standards presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. *Mo.S.Ct.R. 4, Scope # 6.* Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations. *Id.*

The ABA Standards define three levels of culpability for purposes of sanctions. The most culpable mental state is intent, which is defined as acting with “the conscious objective or purpose to accomplish a particular result.” *ABA Standards, Definitions.* Knowledge is the next most culpable mental state defined as “conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Id.* Finally, the least culpable mental state is negligence, which is when a lawyer fails “to

heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Id.*

The distinguishing factor between negligent and knowing conduct is whether a lawyer had a conscious awareness of the conduct underlying the violation or whether he failed to heed a substantial risk that a violation would result from his conduct. *In re Fink, 22 A.3d 461, 474 (Vt.,2011)*. In other words, was the lawyer aware of the circumstances that formed the basis for the violation? *Id.* If so, the conduct was done knowingly. *Id.* If the lawyer instead acted without awareness, but below the accepted standard of care, then he acted negligently. *Id.* Application of these definitions is fact-dependent. *Id.* “The line between negligent acts and acts with knowledge can be fine and difficult to discern, yet the difference between the presumptive sanction of reprimand or suspension is great.” *In re Stansfield, 164 Wash.2d 108, 124, 187 P.3d 254, 262 (2008)*. In the context of sanctions, however, knowing conduct does not encompass both knew or should have known. *In re Fink, 22 A.3d 461, 475 (Vt.,2011)*. If the definition of knowing extended to constructive knowledge then “no misconduct would be negligent because rather than failing to heed a substantial risk we would always assume the lawyer should have known the substantial risk.” *Id. (quoting In re Stansfield, 164 Wash.2d 108, 124, 187 P.3d 254, 263 (2008))*.

An attorney's state of mind is a question of fact. *In re Fink*, 22 A.3d 461, 474 (Vt.,2011); *In re Van Dox*, 214 Ariz. 300, 152 P.3d 1183, 1187 (2007); *In re Preszler*, 169 Wash.2d 1, 232 P.3d 1118, 1127 (2010). The Supreme Court determines all fact issues in an attorney disciplinary proceeding. *Matter of Cupples*, 952 S.W.2d 226, 233 (Mo., banc 1997).

A. RESPONDENT DID NOT KNOWINGLY FAIL TO PROVIDE SERVICES TO A CLIENT OR ENGAGE IN A PATTERN OF NEGLECT BY FAILING TO COMMUNICATE OR DILIGENTLY PURSUING A CLIENT MATTER

1. Larry Mackey

a. Adversary Complaint

Swischer failed to act with reasonable diligence when he negligently missed the deadline to file the adversary complaint in Timothy Bruce's bankruptcy. Swischer acted negligently and not knowingly. Swischer was negligent because he failed to heed a substantial risk, the deadline for filing the Adversary Complaint. Swischer was not aware of the circumstances that lead to the violation, the deadline for filing the Adversary Complaint. If he had been aware of the deadline for filing the Adversary Complaint, he wouldn't have missed the deadline. Although there was potential for injury to Mr. Mackey, none actually resulted. Therefore, Swischer should receive a reprimand. § 4.43, ABA Standards.

B. 341 Meeting and 2004 Examination

Contrary to what Informant states, Swischer attended the 341 meeting and held the 2004 examination. (Tr. pg. 69, Ins. 13 - 20; pg. 70, Ins 7 - 9; pg. 235, Ins. 7 - 20; RoA Vol. III, pg. 339, In. 31; pg. 353, Ins 31 - 33; Respondent's Exhibit A, pg. 17). However, the debtor, Timothy Bruce, failed to appear at both. *Id.* The 341 meeting was rescheduled at a time with Swischer wasn't available, so he missed the 2nd 341 meeting. (Tr. Pg. 235, Ins. 17 - 20). Swischer didn't reschedule the 2004 Examination because he realized he missed the deadline to file the adversary complaint. (Tr. Pg. 203, Ins. 24 - 25; pg. 204, Ins. 1 - 3). It would be futile to reschedule the 2004 examination. Swischer refunded every penny to Mackey (Tr. Pg. 76, Ins. 12 - 20), and, he did in fact tell Mr. Mackey about the missed deadline. (Tr. Pg. 204, Ins. 21 - 25; pg. 205, Ins. 1 - 6; pg. 207, Ins. 16 - 25, pg. 208, Ins. 1 - 8).

Swischer shouldn't be disciplined for the 2004 Examination or the 341 meeting because he acted with reasonable diligence and competence.

2. Regina Foster

Dr. Ellefsen, one of the medical providers that had a lien on the settlement proceeds, was in federal prison for tax evasion, and, Swischer had to track down someone that was handling Dr. Ellefsen's business before he could determine whether or not Ms. Foster owed any money on this lien. (Tr. pg. 345, Ins. 20 - 24; pg. 402, Ins. 7 - 24). Ms. Foster told Swischer that she had made numerous payments on the various liens and she wanted Swischer to follow up with the lien holders to

determine the correct amounts before he paid them. (Tr. pg. 346, Ins. 2 - 7). Therefore, it took Swischer some time to sort out who he should pay and how much. Ms. Foster was correct, she had paid on the liens which is why she received additional money instead of it all going to the third-party medical providers. (Informant's Brief, pg. 22, 2nd full ¶). Additionally, Swischer told his secretary, Sherry Simpson, several times to make out the checks to the known lien holders as the correct amounts were determined. She made the checks out but failed to give them to Swischer for his signature. (Tr. pg. 347 Ins. 22 - 24; pg. 348, Ins. 7 - 10). It was part of her duties to prepare checks for Swischer's signature. (Tr. pg. 356, Ins. 7 - 9). Swischer followed up with Ms. Simpson several times about the checks. (Tr. pg. 356, Ins. 18 - 20). Informant states, "[f]inally, the potential harm was serious in that Ms. Foster's creditors could have turned her over to collections at any time." Ms. Foster incurred the medical bills more than 4 years prior to Swischer receiving the settlement proceeds. The creditors were Ms. Foster's medical care providers and they could have turned Ms. Foster over to collectors at anytime during the 4 years her personal injury case was pending prior to the case settling. If they chose to do that, it isn't Swischer's fault. Instead, as her treating medical care providers, they opted to impose a lien for their payment on her personal injury case. Also she was making payments on the bills which is why Swischer didn't know how much to pay to each one which caused part of the delay. There was no potential for harm to Ms. Foster. Swischer did not display a lack of diligence or competence and should not be

disciplined for the manner in which he handled the settlement proceeds in Regina Foster's case.

3. Sara Foster

In the switch from Mrs. Swischer running the office to Mr. Swischer taking over, Mr. Swischer did not learn about Sara Foster's case; it was simply missed. (Tr. Pg. 312, Ins. 9 - 20). Sherry Simpson was Swischer's secretary at the time and the office was in complete disarray because Sherry Simpson was not competent to function as a legal secretary or paralegal. (Tr. pgs. 90 - 96; pg. 101, Ins. 9 - 24; 189, Ins. 20 - 25; pg. pg. 190, Ins. 1 - 16; pg. 419, ln. 6 - pg. 423, ln. 12;). That is why the case was overlooked. As soon as Swischer learned of the case he completed it to the satisfaction of Ms. Foster. Swischer was diligent and competent and should not be disciplined for this matter.

If the court doesn't agree with this determination, then Swischer was negligent in his diligence in handling Sara Foster's adoption which caused no actual or potential injury to Ms. Foster thereby justifying an admonition. Swischer acted negligently and not knowingly. Swischer was negligent because he failed to heed a substantial risk, an overlooked a file when he took over his wife's practice. Swischer was not aware of the circumstances that lead to the violation (i.e., the existence of Sara Foster's case). If he had been aware of Sara Foster's case, he wouldn't have delayed in completing the adoption. Swischer would receive an admonition according to ABA Standards § 4.44.

4. Charles Gossett

A. Discovery, Affidavit of Merit and Dismissing the Lawsuit

As stated previously, Swischer did nothing wrong with not responding to Discovery, obtaining an extension of time to file the Affidavit of Merit and dismissing the lawsuit because each of these matters relate to procedure, technical and legal tactical issues for which Swischer, as Mr. Gossett's attorney is responsible and he should not be disciplined.

B. Re-Filing the Lawsuit

To discipline Swischer for taking too long to re-file the lawsuit for Mr. Gossett violates Swischer's Constitutional Rights to Due Process and Equal Protection as Guaranteed by the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution because such an application of Mo.S.Ct.R. 4-1.3 and 4-3.2 is void for vagueness. Each of the actions taken by Swischer benefitted Gossett and kept his case alive. No other attorney would take Mr. Gossett's case. Swischer worked diligently to preserve Mr. Gossett's claim and was successful. If Swischer is disbarred or suspended, Mr. Gossett will not have anyone to handle his lawsuit and he will lose his medical malpractice claim.

5. Adequate Communication with Clients

There was a period of time during which Swischer did not return client's calls. However, he was not receiving all of the messages when his clients called. (Tr. Pg. 214, Ins. 14 - 25; pg. 216, Ins. 1 - 24; pg. 320, Ins. 22 - 25). Sherry Simpson was not

competent to function as a legal secretary or paralegal. (Tr. pgs. 90 - 96; pg. 101, Ins. 9 - 24; pg. 419, In. 6 - pg. 423, In. 12). Swischer received a recommendation about Sherry Simpson's work from Laura West, an attorney at Scott Frederick's Office. (Tr. pg. 367, Ins. 14 - 25; pg. 368, In. 1). When Scott Frederick approached Swischer about Frederick's concerns about Sherry Simpson, it was Laura West that downplayed Frederick's assessment of Sherry Simpson's abilities and assured Swischer Sherry Simpson would be fine. (Tr. pg. 368, Ins. 2 - 7). Sherry Simpson's work was a tremendous improvement over Swischer's prior secretary causing Swischer to lower his guard, and, Swischer made every attempt to monitor her work to ensure everything was done correctly. (Tr. pg. 371, Ins. 21 - 25; pg. 372, Ins. 1 - 9). Swischer knew Sherry Simpson was calling in sick regularly and would be incoherent on some days. That is to what he believed Scott Frederick was referring when he said Sherry Simpson wouldn't be a good secretary. There is a tremendous leap from a secretary that is calling in sick and struggling with her medications to a secretary that is not giving you your messages or mail. Just because you are aware of a secretary's issues with medications and calling in sick a lot doesn't mean you would automatically jump to the conclusion her filing was not current, you aren't getting your mail or your messages. Swischer did everything he could reasonably do to monitor her work. (Tr. Pg. 371, Ins. 17 - 25; pg. 372, Ins. 1 - 17). She was just very good at hiding her deficiencies.

You can't return calls you don't know you are receiving. Swischer did communicate to Mr. Gossett that he was going to dismiss and re-file the case. Mr. Gossett testified he didn't understand how any of these things worked.

There is simply no evidence Swischer acted with "the conscious objective or purpose to not communicate with his clients. The evidence is that his clients called his office, spoke to his secretary, left messages but did not receive a return call and, Swischer did not receive those messages. Swischer was not consciously aware of the nature or attendant circumstances (i.e., the telephone messages), therefore he did not act knowingly. Likewise, Swischer did not fail to heed a substantial risk that circumstances existed or that a result will follow, due to a deviation from the standard of care that a reasonable lawyer would exercise in the situation. He was checking with Sherry Simpson to see if he had messages, and, she didn't give them to him. There was nothing to suggest to Swischer that a problem existed until he found the letters from the OCDC on Sherry Simpson's desk. Swischer wasn't even negligent about communicating with his clients.

6. Withdrawal of Complaints by Mackey and Rash

The Supreme Court should not discipline Swischer because Mr. Mackey and Mrs. Rash agreed to withdraw their complaints. Nothing in the Missouri Supreme Court Rules, the comments thereto or the case law would suggest there is anything wrong with what Mr. Swischer did. There is persuasive authority approving of Swischer's actions from New York, ***Chase vs. New York State Bar Association*, 51**

A.D.2d 833, 379 N.Y.S.2d 551, 552 (S.Ct. NY 1976). Therefore, the application of the Rule urged by Informant is void for vagueness.

If this court does not accept the application of the Rule urged by Informant is void for vagueness, then the court should impose an admonition. **§ 7.4 ABA Standards.** Swischer was possibly negligent in determining the correct resolution between conflicting persuasive precedents because he failed to heed a substantial risk that circumstances exist or that a result might follow, which failure is a deviation from the standard of care that a reasonable lawyer might exist in the situation. There was no injury or potential injury that was reasonably foreseeable to the clients, the public, the legal system or the profession.

While a lawyer's good faith belief his actions are not misconduct may not be a defense to a violation, such an error can be a factor in imposing discipline. N. Moore, Mens Rea Standards in Lawyer Disciplinary Codes, 23 Geo. J. Legal Ethics 1, 52 (2010) (explaining that lawyer's mistake of law is not an excuse to disciplinary violation, but courts consider whether lawyer acted in good faith in fashioning sanction). ***In re Fink, 22 A.3d 461, 475-76 (Vt.,2011).***

B. Swischer did not Cause any Adverse Effect on a Legal Proceeding

Both Mackey and Rash appeared to testify. If Informant had any concerns about them not appearing to testify, Informant could take their depositions and/or subpoena them to appear for the hearing. There is no evidence in the record of

Swischer's conduct having any impact on the proceeding, nor is there any evidence his conduct had the potential to impact the proceeding.

C. Swischer did not Improperly Deal with Funds

There is simply no evidence in the record of any injury or potential injury to anyone. Swischer withheld \$2,219.00 to pay lien holders. (Informant's Brief, pg. 20, middle ¶). If, as in *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010), it was a simple matter of then cutting checks to various lien holders in the exact known amounts then perhaps Informant would have a point. However, the fact that Ms. Foster received a refund of \$1,065.00 (Informant's Brief, pg. 22, 2nd full ¶) tells us the amounts of the liens weren't known. The evidence was that Mrs. Foster told Swischer she paid on the various liens during the pendency of the case, and, she wanted Mr. Swischer to check the amounts before he paid them. (Tr. Pg. 346, Ins. 2 - 7). He did that, and, it turned out Mrs. Foster was correct. The amounts of the liens were considerably less than initially believed. Therefore, Mrs. Foster received a substantial refund. If the only thing Swischer had to do was verify the amounts due, then he could have completed everything relatively quickly. However, one of the lien holders, Dr. Ellefsen was in federal prison for income tax evasion. (Tr. Pg. 345, Ins. 20 - 24; pg. 402, Ins. 7 - 24). It took Swischer quite sometime to track down the person that was managing Dr. Ellefsen's accounts. *Id.* He did that verified no amount was due and completed the disbursement. *Id.* The ABA Standards presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and

circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. ***Mo.S.Ct.R. 4, Scope # 6***. Swischer had incomplete information of the amounts due and the location of the lien holders. That is what occasioned the delay. Swischer did nothing wrong.

D. Swischer Followed the ABA Standards and Responded to the Complaints he could and in the manner he thought appropriate

Sherry Simpson was not competent to function as a legal secretary or paralegal. (Tr. pgs. 90 - 96; pg. 101, Ins. 9 - 24; pg. 419, ln. 6 - pg. 423, ln. 12). When the first 3 complaints came in, Sherry Simpson did not give them to Swischer and he didn't know about them (Tr. pg. 380, Ins. 1 - 6). He couldn't respond to something he didn't know existed. Swischer did respond to Mr. Mackey's complaint. (Tr. pg. 392, Ins. 23 - 25; Informant's Rec. on App, pg. 945, exhibit 54). However, the response Swischer submitted was deemed by the OCDC to not be an appropriate response. Swischer responded to the complaint of Sara Foster. (Tr. pg. 403, Ins. 15 - 20). Once he discovered them, he discovered everything else that Sherry Simpson hadn't done and hadn't told him he spent his time tearing his office apart, putting it back together and trying make sure he didn't miss anything so no harm came to any clients. (Tr. pg. 384, Ins. 6 - 20). The extra work, plus dealing with a daughter that was diagnosed with Asperger syndrome (Tr. pg. 305, Ins. 17 - 19; pg. 395, Ins. 9 - 25, pg. 397, Ins. 1 - 7 & 20 - 23) left Swischer with a choice. He could spend his time responding to the complaints and risk missing a deadline, leading to harm to a client,

or, he had to do a complete inventory of the office and make sure he was on top of everything. (Tr. pg. 384, Ins. 21 - 25; pg. 385, Ins. 1 - 2). He chose to put his clients first before himself. Swischer understands the profound duty imposed by the profession. However, sometimes there just isn't enough time to get everything done. Swischer understood his duty to his clients and made that his first priority.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system. **Mo.S.Ct.R. 4, Preamble.**

The most important ethical duties for an attorney are those that are owed to a client. See ABA Standards. (Informant's Brief, pg. 74, Ins. 3 - 4). Therefore when he didn't have sufficient time to do everything, Swischer correctly chose to devote his time to ensuring he didn't miss something for a client, instead of responding to the OCDC. The application of Mo.S.Ct.R. 4-8.1(c) urged by Informant violates Swischer's Constitutional Rights to Due Process and Equal Protection as Guaranteed by the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution.

Aggravating and Mitigating Factors

1. Aggravating Factors:
 - a. Swischer has no prior disciplinary offenses;
 - b. Swischer did not display a dishonest or selfish motive. His actions were at all times in the best interest of his clients.
 - c. There is no pattern of misconduct. Swischer found himself in a perfect storm. He was practicing law in Nevada, Missouri in his father's office. His wife was practicing in Butler, Missouri. His daughter was diagnosed with Asperger's Syndrome and had to be institutionalized. They had 2 other small children at home. There was no way for Swischer and his wife to care for their 3 children and both of them work. Swischer's wife became a stay at home mom, and, Swischer moved to Butler, Missouri with his files and also took over his wife's practice. This was not an orderly transition. Mrs. Swischer went home and Mr. Swischer walked into an office about which he knew nothing, added his files and tried to do the best he could. The first thing he discovered was the secretary wasn't doing her job so he let her go and hired Sherry Simpson. Sherry Simpson came highly recommended by Laura West the attorney in Scott Friedrich's Butler, Missouri office. Sherry Simpson appeared to Swischer to be a huge

improvement, and, although he monitored her work, he found nothing wrong with it. When Scott Friedrich later suggested to Swischer that Sherry Simpson might not be the best choice for a secretary, Laura West again assured Swischer Sherry Simpson would do a good job for him. Sherry Simpson's incompetence resulted in phone messages not being returned, Swischer not knowing Sara Foster was a client and was part of the delay in Swischer paying the lien holders in Regina Foster's case. After Swischer discovered the bar complaints on Sherry Simpson's desk that she hadn't given him, the mess she created in the office resulted in Swischer's missed deadlines to respond to the OCDC and ultimately forced Swischer to not respond at all to some of the complaints. It is also probably the reason Swischer couldn't find the original contingent fee contract with Mr. Gossett. There is no pattern of misconduct by Swischer. It was simply a bad set of circumstances that led to 1 mistake after another.

- d. Informant claims there are multiple offenses. These multiple offenses are, as described in paragraph c above, simply a bad set of circumstances that led to 1 mistake after another.
- e. Swischer admits he did not respond to all of the inquiries by the OCDC. However, his failure to do so was not due to bad faith or

an attempt to obstruct the proceeding. Due to the circumstances, described in paragraph c above, he just didn't have sufficient time to respond and fulfill his duties to his clients. He chose between conflicting duties as outlined in the Rules for Professional Conduct and made the correct choice.

- f. Swischer did not submit false evidence, false statements or engage in deceptive practices during the disciplinary process.
- g. Swischer has admitted his conduct that violated the rules, but provided an explanation when he felt there was one:
 - i. He violated Mo.S.Ct.R. 4-13. by missing the deadline to file the adversary complaint for Mr. Mackey;
 - ii. While technically violations:
 - (1) not responding to all of the requests for information from the OCDC;
 - (2) not returning all of his phone calls; and
 - (3). There was a delay in Sara Foster's Adoption;

Swischer's actions don't amount to conduct that justifies discipline because he did not possess the mental state necessary for the conduct to be actual violations and such a violation may violate due process as being void for vagueness.

- h. None of Swischer's clients were particularly vulnerable.

i. Swischer began practicing in September, 2002. These complaints are about conduct spanning a period from 2005 - 2010. Swischer had only 3 years of experience before the problems started and they simply snowballed over a period of 5 years.

j. Swischer voluntarily, without any request, made restitution to Mr. Mackey of everything Mr. Mackey paid to Swischer, and then some.

Swischer did not engage in any conduct that was illegal.

2. Mitigating Factors:

- a. Swischer does not have a prior disciplinary record.
- b. Swischer did not have a dishonest or selfish motive.
- c. Swischer was dealing with a tremendous personal problem with his daughter being diagnosed with Asperger's Syndrome and had to be institutionalized, resulting in him moving his office and taking over another lawyer's practice in the process.
- d. Swischer voluntarily, without any request, made restitution to Mr. Mackey made restitution to Mr. Mackey, and, then some.
- e. Swischer made full and free disclosure to the disciplinary board and cooperated fully throughout, other than when he wasn't able

to respond to some of the complaints, admitting approximately 191 paragraphs of the charging information.

- f. Swischer was inexperienced in the practice of law when the problems began and they snowballed over a 5 year period.
- g. Swischer enjoys a good character and reputation in the legal community (see exhibits).
- h & i. Swischer does not suffer from a physical or mental disability or from chemical dependency.
- j. The disciplinary proceedings spanned approximately 3 years, Sara Foster's complaint being filed in June, 2009.
- k. There have been no other penalties or sanctions imposed.
- l. Swischer is remorseful. He took full responsibility for everything that occurred. (Tr. pg. 387, Ins. 15 - 17). He apologized to each of the clients for any problems they had. He made restitution to Mr. Mackey without any request therefor.
- m. Swischer has no prior offenses.

Conclusion

Wherefore, for the foregoing reasons, the court should:

- a. find Respondent violated Mo.S.Ct.R. 4-1-3 for missing the deadline to file the Adversary complaint for Mr. Mackey;
- b. based upon the mitigating factors, admonish or Reprimand Respondent for the violation; and
- c. provide Respondent such other and further relief as the court deems just and proper.

CERTIFICATION

I hereby certify:

1. the claims, defenses, requests, demands, objections, contentions, or arguments contained herein are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. the brief complies with the limitations contained in Rule 84.06(b) and the number of words in the brief is 14,683 according to the word count in WordPerfect X4 which is the word processing system used to prepare this brief.

3. The electronic copy of this brief filed with the court has been scanned for viruses and it is virus free.

Respectfully Submitted,

CASKEY, HOPKINS and WILHELMUS, LLC.

By: /s/ R. Todd Wilhelmus
R. Todd Wilhelmus MO # 32270 / KS # 14742
8 N Delaware Street
PO Box 45
Butler, MO 64730
Telephone No. (660) 679-4161
Facsimile No. (660) 679-6268
ATTORNEYS FOR RESPONDENT

Certificate of Service

I hereby certify on the 26th day of April, 2012, I served the foregoing on Informant Shannon L. Briesacher, Staff Counsel of the Office of Disciplinary Counsel, 3335 American Ave., Jefferson City, Missouri 65109, electronically, by uploading it to the electronic case file.

/s/ R. Todd Wilhelmus
R. Todd Wilhelmus, attorney for Respondent